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June 6, 1994

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JUN 6 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Motion to Dismiss the Application of WII."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

B:CATON.142

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 6 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

)
)
) MM Docket No. 93-107

)
) File Nos. BPH-911230MA

)
) through

)
) BPH-911231MB
)

To: The Review Board

MOTION TO DISMISS THE APPLICATION OF WII

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____

Stephen T. Yelverton
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June 6, 1994

B:CATON.142

MOTION TO DISMISS THE APPLICATION OF WII

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, hereby submits this motion to dismiss the application of Wilburn Industries, Inc. ("WII"). Dismissal is required because it lost "reasonable assurance" of its initially proposed tower site and because it has failed to diligently amend its application with the required engineering data for its new proposed tower site.

ORA requests leave to file this motion. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because this motion raises certain basic qualifying and non-integration matters, it is appropriate. In support of its motion to dismiss, ORA offers the following comments.

In an amendment filed on April 13, 1994, WII reported that its proposed tower site had been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Although WII never disclosed when the site was sold, it was given written confirmation of the sale by Mid-Ohio at least by March 2, 1994. WII was informed on April 8, 1994, that the new owner would not make the site available to it.

WII further represented, in its April 13, 1994, pleading, that it had received "reasonable assurance" of the availability of another tower site and would be filing the required engineering data as soon as possible. WII represented that it would be specifying the same tower site as specified by ORA. WII so far has failed to file an amendment providing the required engineering data.

Accordingly, the application of WII must be dismissed with prejudice for failure to prosecute. It has not been diligent in amending its application. WII has known for almost two months (since April 8, 1994) that its specified tower site would not be made available to it.

WII then represented on April 13, 1994, that it had "reasonable assurance" of the tower site specified by ORA and promised to file an amendment as soon as possible to provide the required engineering data. It has now been over six

weeks since that promise has been made and WII has inexplicably not been heard from.

Commission policy requires that WII act with "due diligence" in obtaining "reasonable assurance" for a new tower site and in amending its application. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990); Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982). See also, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970).

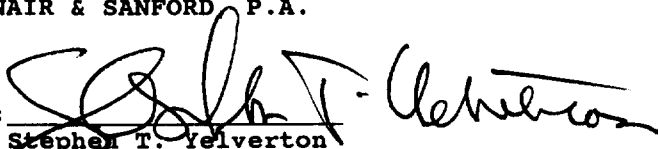
An applicant without a tower site and without a properly amended application is ineligible for grant and must be dismissed from the proceeding forthwith. See generally, Marc A. Albert, 6 FCC Rcd 13, 14-15, para. 6 (Rev. Bd. 1991), citing Local Morgan Hill Radio Association, 4 FCC Rcd 2404 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 498 (1990), summary dismissal is appropriate where a basic qualifying matter is not met; Chudy Broadcasting Corp., 58 RR2d 133 (1988), temporizing with a flawed application proposal does not serve the public interest.

WHEREFORE, in view of the foregoing, WII must be dismissed with prejudice because it has failed to diligently prosecute its application by not properly amending its application with the required engineering data for its new proposed tower site.

Respectfully submitted,

McNAIR & SANFORD P.A.

By:


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June 6, 1994

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ORA.654

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 6th day of June, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Motion to Dismiss the Application of WII" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

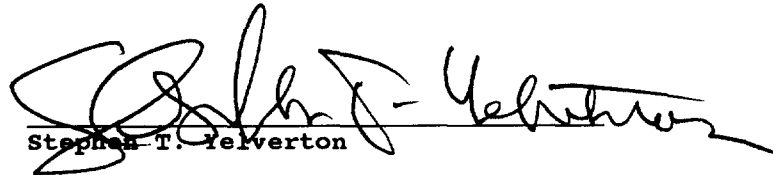
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*Hand Delivery